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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION**

IN RE NJOY, INC. CONSUMER  
CLASS ACTION LITIGATION

) Case No. CV 14-00428 MMM(JEMx)  
)  
) **CLASS ACTION**  
) **PLAINTIFFS' MEMORANDUM**  
) **OF POINTS AND AUTHORITIES**  
) **IN SUPPORT OF MOTION FOR**  
) **CLASS CERTIFICATION**  
)  
) Judge: Margaret M. Morrow  
) Place: Courtroom 780  
) Date: July 27, 2015  
) Time: 10:00 a.m.

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION AND SUMMARY OF THE FACTS.....</b>	<b>1</b>
<b>II.</b>	<b>ARGUMENT .....</b>	<b>5</b>
<b>A.</b>	<b>Legal Standard for Class Certification Under Rule 23 .....</b>	<b>5</b>
<b>B.</b>	<b>Plaintiffs Have Satisfied the Requirements of Rule 23(a).....</b>	<b>6</b>
<b>C.</b>	<b>The Proposed Class Is Ascertainable .....</b>	<b>8</b>
<b>D.</b>	<b>The Class Can Be Maintained Under Rule 23(b)(3).....</b>	<b>9</b>
<b>1.</b>	<b>Plaintiffs Satisfy Predominance Under Rule 23(b)(3)(i).....</b>	<b>9</b>
<b>a)</b>	<b>Common Questions of Fact Predominate .....</b>	<b>10</b>
<b>(1)</b>	<b>Defendant Disseminated the Same False and Deceptive Safety Message Across Various Media.....</b>	<b>10</b>
<b>(2)</b>	<b>Reasonable Consumers Would Understand NJOY’s Marketing as Conveying a Safety Message.....</b>	<b>14</b>
<b>(3)</b>	<b>Common Evidence Will Show Defendant Intended to Imply the Safety Message.....</b>	<b>16</b>
<b>(4)</b>	<b>Common Evidence Can Be Used to Establish Materiality.....</b>	<b>18</b>
<b>(5)</b>	<b>Common Evidence Can Be Used to Establish Whether NJOYs Are Safe or Safer than Cigarettes.....</b>	<b>20</b>
<b>b)</b>	<b>Common Questions of Law Predominate.....</b>	<b>20</b>
<b>(1)</b>	<b>The California Consumer Protection Claims.....</b>	<b>20</b>
<b>(2)</b>	<b>Florida Consumer Protection Claims.....</b>	<b>20</b>
<b>c)</b>	<b>Plaintiffs’ Damages Are Calculable Classwide.....</b>	<b>21</b>
<b>E.</b>	<b>A Class Action is a Superior Means of Resolving these Claims.....</b>	<b>24</b>
<b>III.</b>	<b>CONCLUSION.....</b>	<b>25</b>

## TABLE OF AUTHORITIES

### CASES

**Pages**

<i>Amchem Products v. Windsor</i> , 521 U.S. 597 (1997).....	9
<i>Amgen Inc. v. Connecticut Retirement Plans &amp; Trust Funds</i> , 133 S. Ct. 1184 (2013).....	18
<i>Apple Inc. v. Samsung Electronics Co.</i> , 735 F.3d 1352 (Fed. Cir. 2013) .....	22
<i>Arnold v. FitFlop USA, LLC</i> , 2014 U.S. Dist. LEXIS 58800 (S.D. Cal. Apr. 28, 2014) .....	25
<i>Bezdek v. Vibram USA Inc.</i> , 2015 U.S. Dist. LEXIS 5508 (D. Mass. Jan. 16, 2015).....	25
<i>Cabral v. Supple, LLC</i> , 2013 U.S. Dist. LEXIS 184170 (C.D. Cal. Feb. 14, 2013).....	7, 10
<i>Carrera v. Bayer Corp.</i> , 727 F.3d 300 (3d Cir. 2013) .....	8
<i>Comcast Corp. v. Behrend</i> , 133 S. Ct. 1426 (2013).....	21
<i>In re ConAgra Foods, Inc.</i> , 2015 U.S. Dist. LEXIS 24971 (C.D. Cal. Feb. 23, 2015) .....	<i>passim</i>
<i>Fitzpatrick v. General Mills, Inc.</i> , 263 F.R.D. 687 (S.D. Fla. 2010), <i>vacated on other grounds</i> , 635 F.3d 1279 (11th Cir. 2011).....	20
<i>Forcellati v. Hyland's Inc.</i> , 2014 U.S. Dist. LEXIS 50600 (C.D. Cal. Apr. 9, 2014).....	20

1	<i>Guido v. L'Oreal, USA, Inc.,</i>	
2	2014 U.S. Dist. LEXIS 165777 (C.D. Cal. July 24, 2014) .....	8, 22, 23
3	<i>Heighley v. J.C. Penney Life Ins. Co.,</i>	
4	257 F. Supp. 2d 1241 (C.D. Cal. 2003) .....	20
5	<i>In re High-Tech Employee Antitrust Litigation,</i>	
6	289 F.R.D. 555 (N.D. Cal. 2013) .....	24
7	<i>Johnson v. General Mills, Inc.,</i>	
8	275 F.R.D. 282 (C.D. Cal. 2011) .....	10, 18
9	<i>Johns v. Bayer Corp.,</i>	
10	280 F.R.D. 551 (S.D. Cal. 2012) .....	6
11	<i>Keegan v. American Honda Motor Co.,</i>	
12	284 F.R.D. 504 (C.D. Cal. 2012) .....	7, 20
13	<i>Kwikset v. Superior Court,</i>	
14	51 Cal. 4th 310 (2011) .....	20
15	<i>Makaeff v. Trump University,</i>	
16	2014 U.S. Dist. LEXIS 22392 (S.D. Cal. Feb. 21, 2014) .....	10
17	<i>McCrary v. Elations Co.,</i>	
18	2014 U.S. Dist. LEXIS 8443 (C.D. Cal. Jan. 13, 2014) .....	8
19	<i>Nelson v. Mead Johnson Nutrition Co.,</i>	
20	270 F.R.D. 689 (S.D. Fla. 2010) .....	10
21	<i>In re Nucoa Real Margarine Litigation,</i>	
22	2012 U.S. Dist. LEXIS 189904 (C.D. Cal. June 12, 2012) .....	8
23	<i>Roach v. T.L. Cannon Corp.,</i>	
24	778 F.3d 401 (2d Cir. 2015) .....	21
25	<i>Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.,</i>	
26	559 U.S. 393 (2010) .....	6
27		
28		

<i>In re Toyota Motor Corp. Hybrid Brake Marketing</i> , 2012 U.S. Dist. LEXIS 151559 (C.D. Cal. Sept. 20, 2012) .....	24
<i>TV Interactive Data Corp. v. Sony Corp.</i> , 929 F. Supp. 2d 1006 (N.D. Cal. 2013) .....	22
<i>Vaccarino v. Midland Nat’l Life Ins. Co.</i> , 2014 U.S. Dist. LEXIS 18601 (C.D. Cal. Feb. 3, 2014) .....	21, 24
<i>Wiener v. Dannon Co.</i> , 255 F.R.D. 658 (C.D. Cal. 2009) .....	6

## STATUTES & RULES

California Consumers Legal Remedies Act, Cal. Civil Code §§1750, <i>et seq.</i> (“CLRA”) .....	2, 10
California Unfair Competition Law (“UCL”), Cal. Bus. & Professional Code §§17200, <i>et seq.</i> .....	2, 10
Federal Rules of Civil Procedure	
9(b) .....	3
23(a) .....	2, 4
23(a)(1) .....	6
23(a)(2) .....	6
23(a)(3) .....	6
23(a)(4) .....	7
23(b)(3) .....	<i>passim</i>
23(b)(3)(i) .....	9
Florida Deceptive and Unfair Trade Practices Act (“FDUPTA”) .....	2, 11

**I. INTRODUCTION AND SUMMARY OF THE FACTS**

Defendant NJOY<sup>1</sup> is one of the top manufacturers of e-cigarettes in the United States and, during the Class Period (defined below), sold millions of its NJOY e-cigarettes nationwide. NJOY's stated [REDACTED] was to [REDACTED] *See, e.g.,* A-558055.<sup>2</sup> Given the widely known health dangers of combustible tobacco cigarettes, NJOY knew that the only way to effect a migration to NJOY electronic e-cigarettes ("NJOYs") was to convey the message that NJOYs had health benefits over cigarettes, but with the same level of enjoyment. *Id.* [REDACTED]

[REDACTED] However, because of restrictions on health claims by the Food and Drug Administration ("FDA") and a Consent Judgment NJOY signed with the California Attorney General ("AG"), NJOY could not overtly advertise the health benefits of its products. To increase sales, NJOY thus used a pervasive, deceptive marketing scheme that conveyed the implicit message that NJOYs were known to be safe or safer than combustible tobacco cigarettes (the "Safety Message"). In fact, NJOY's main challenge was to make sure that the wording of its marketing [REDACTED]

[REDACTED] B-43152. To further promote the Safety Message, NJOY also made partial disclosures and omitted an ingredient list on its products' packages to create the misleading impression that the only material health risks in using NJOYs were related to nicotine.

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<sup>1</sup> Unless otherwise stated, defined terms have the same meanings ascribed to them as in the Third Consolidated Amended Complaint ("¶\_\_") (Dkt. 82).

<sup>2</sup> "A" refers to Exhibit A of the accompanying Declaration of Janine L. Pollack ("Pollack Dec.") and 558056 refers to an NJOY-produced document without the NJOY prefix and the zeros before the number. This citing convention is used throughout this memorandum.

1 Contrary to NJOY's Safety Message, however, numerous studies have found  
2 dangerous carcinogens and toxins and related and other health risks in using NJOYs  
3 and similar e-cigarettes. In fact, numerous studies have found that, at a minimum,  
4 more research is required before the long-term effects of use can be known, and that  
5 e-cigarettes cannot be deemed safe at this time. Defendant was well aware of these  
6 studies. Consumers were not.

7 Plaintiff Ben Z. Halberstam, a consumer living in California, and Plaintiff  
8 Kathryn Thomas, a consumer living in Florida, like thousands of others in their  
9 respective states, purchased NJOYs during the Class Period.<sup>3</sup> ¶¶14, - 16-18, 20.  
10 Each Plaintiff saw and relied upon NJOY's deceptive representations and omissions  
11 through exposure to its advertisements and/or NJOYs' packages. ¶¶110-12, 116.  
12 Plaintiffs bring claims under the consumer protection statutes of California and  
13 Florida,<sup>4</sup> on behalf of themselves and other purchasers of NJOYs in their states  
14 during the Class Period. Plaintiffs seek certification of a California Class and a  
15 Florida Class (collectively, the "Class") under Federal Rule of Civil Procedure 23(a)  
16 and (b)(3).

17 Consumers' perception of NJOY's marketing and materiality can be  
18 established on a classwide basis. Plaintiffs' marketing expert, Dr. Thomas J.  
19 Maronick, conducted a survey that found a significant percentage of consumers  
20 understood NJOY's ads to convey the Safety Message, which proves a "reasonable  
21 person" could take away that message. The survey also showed that the purported  
22 safety of NJOYs was material to those consumers, and that consumers would have

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23 <sup>3</sup> A third Plaintiff, Eric McGovern, voluntarily dismissed his claims in this action on  
24 May 20, 2015 (Dkt. 114), and is not seeking to represent the Class.

25 <sup>4</sup> California Unfair Competition Law, Cal. Bus. & Prof. Code §§17200, *et seq.*  
26 ("UCL"), California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et*  
27 *seq.* ("CLRA"), Florida Deceptive and Unfair Trade Practices Act ("FDUTPA").



1 wanted all health risks to be disclosed on NJOY packages. [REDACTED]

2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED] This evidence not only shows  
6 that materiality here can be answered by common proof, but that such proof is  
7 already in hand.

8 NJOY's Safety Message, implied through similar phrases and concepts across  
9 all of its advertising, was part of a uniform deceptive marketing scheme. For  
10 example, NJOY had a widely shown television ad featuring the slogan "Friends  
11 Don't Let Friends Smoke," which also includes a voiceover stating: "Give them  
12 [i.e., friends] the only electronic cigarette worth switching to, the NJOY King.  
13 Cigarettes, you've met your match." ¶90. Plaintiff Halberstam alleges that he saw  
14 NJOY's "Resolution Solution" print ad (¶111), which states, "Smokers finally have  
15 a real alternative," and "Cigarettes, You've Met Your Match." ¶76. In the Tentative  
16 Order denying NJOY's Motion to Dismiss in part ("TO") (Pollack Dec., Ex. AV),  
17 this Court stated that these advertisements, including the "alternative"/"switching"  
18 concept and the "cigarettes, you've met your match" copy, which also appears in  
19 much of NJOY's other advertising, could "suggest to a reasonable consumer that the  
20 NJOY King is superior because it is safer than traditional cigarettes." TO at 21. In  
21 the TO, the Court also stated that it "decline[d] to dismiss the claims to the extent  
22 they are based on advertisements plaintiffs did not themselves see or hear," and thus  
23 the claims include all substantially similar marketing seen by Class members. *Id.* at  
24 41.<sup>5</sup>

25  
26  
27 <sup>5</sup> Halberstam also alleges that he saw the "Try Something New in Bed" print ad.  
28 ¶111. While the Court tentatively held that Fed. R. Civ. P. 9(b) was not met with  
respect to that ad because Halberstam had not pled where and when he saw it with  
(continued...)



1 Each Plaintiff also alleges he or she saw NJOY's packaging, which is alleged  
2 to be deceptive through partial disclosures and omissions. ¶¶110, 116. In the TO,  
3 the Court tentatively held that Plaintiffs' omission claim is actionable. TO at 37. All  
4 Class members were exposed to NJOY's packaging, and common evidence will  
5 resolve the omission claims.

6 As shown below, the requirements of Rule 23(a) of numerosity, commonality,  
7 typicality and adequacy are easily met here and the Class is ascertainable. Rule  
8 23(b)(3) is also satisfied. Individual issues do not predominate. Consideration of the  
9 claims requires no assessment of the behavior or values of individual Class  
10 members. Under the relevant state consumer statutes, deceptiveness turns on what a  
11 reasonable consumer would believe, which is determined through common  
12 evidence. Here, Dr. Maronick's study found, for example, that 73% of those  
13 viewing the "Friends Don't Let Friends Smoke" commercial, and 43% of those who  
14 saw the "Resolution Solution" and "Try Something New in Bed" print ads believed  
15 they conveyed the message that NJOYs are safe or safer for health than traditional  
16 cigarettes, and 90 to 95% of those consumers believed the "safe" and "safer"  
17 message in the ads was important or very important. The reasonableness of this  
18 belief is thus not only provable, but has been shown, on a classwide basis.

19 In addition, the damages ascribable to Plaintiffs' theory of the case can be  
20 established on a classwide basis. Plaintiffs have retained an economist, Dr. Jeffrey  
21 E. Harris of the Massachusetts Institute of Technology, who has served as an expert  
22 in multiple light cigarette cases. Dr. Harris proposes two damages models: conjoint  
23 analysis and the direct survey method. With conjoint analysis, one can isolate the  
24 value or "partworth" that NJOY consumers place on the Safety Message by using a

25  
26 \_\_\_\_\_  
(...continued)

27 adequate specificity (TO at 27), the ad may nonetheless be included as part of  
28 NJOY's overall deceptive scheme.

1 survey that provides choice sets that group multiple attributes, and, based on the  
2 aggregate responses, uses statistical analysis to assign a separate value to the worth  
3 of each attribute. This Court has held that conjoint analysis is an acceptable method  
4 for computing classwide damages at the class certification stage. *In re Conagra*  
5 *Foods, Inc.*, 2015 U.S. Dist. LEXIS 24971, at \*\*245-46 (C.D. Cal. Feb. 23, 2015)  
6 (Morrow, J.) (“*ConAgra*”). With the direct survey method, which can be used as an  
7 alternative to or together with the conjoint analysis, consumers are asked directly  
8 how much, if at all, they would pay for a safe or safer e-cigarette. Under both  
9 models, the specific value of the Safety Message is applied to historical prices to  
10 compute classwide damages (available from Nielsen and NJOY for its internet  
11 sales).

12 Accordingly, Plaintiffs’ motion for class certification should be granted.

## 13 **II. ARGUMENT**

14 Because this action can be proven or disproven on a classwide basis, the  
15 following classes should be certified:

- 16 • **All persons, exclusive of Defendant and its employees, who**  
17 **purchased in or from California one or more NJOY E-Cigarettes**  
18 **sold by Defendant during the Class Period (the “California Class”).**
- 19 • **All persons, exclusive of Defendant and its employees, who**  
20 **purchased in or from Florida one or more NJOY E-Cigarettes sold**  
21 **by Defendant during the Class Period (the “Florida Class”).**<sup>6</sup>

### 22 **A. Legal Standard for Class Certification Under Rule 23**

23 To certify a class, Plaintiffs must “satisfy the criteria set forth in subdivision  
24 (a) ... and it also must fit into one of three categories described in subdivision (b).”

---

25 <sup>6</sup> The class period for the California Class is from January 17, 2010 until the date of  
26 notice. ¶119. The class period for the Florida Class is July 9, 2010 until the date of  
27 notice. ¶120. Unless stated otherwise, the two class periods are collectively  
28 referenced as the “Class Period.”

1 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398  
2 (2010). Plaintiffs seek certification under Rule 23(b)(3).

3 **B. Plaintiffs Have Satisfied the Requirements of Rule 23(a)**

4 Rule 23(a)(1)'s numerosity requires a showing that joinder of all claims  
5 would be difficult or inconvenient, not impossible. *ConAgra*, 2015 U.S. Dist.  
6 LEXIS 24971, at \*96. In 2013 alone, NJOY sold more than [REDACTED]  
7 [REDACTED] (C-241167), which shows sufficient numbers of  
8 individuals purchased NJOYs in California and Florida. *Johns v. Bayer Corp.*, 280  
9 F.R.D. 551, 556 (S.D. Cal. 2012) (reasonable to assume sufficient number  
10 purchased product in California where national sales were large). In fact, [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED] AT-726426, AU-726430. Numerosity is  
14 satisfied.

15 Plaintiffs also satisfy the commonality requirement of Rule 23(a)(2). This  
16 "requirement is construed liberally," and the existence of some common legal and  
17 factual issues is sufficient. *ConAgra*, 2015 U.S. Dist. LEXIS 24971, at \*97. Where  
18 "proposed class members clearly share common legal issues regarding [the] alleged  
19 deception and misrepresentations in [the] advertising and promotion of [p]roducts,"  
20 the commonality requirement is met. *Wiener v. Dannon Co.*, 255 F.R.D. 658, 664-  
21 65 (C.D. Cal. 2009). Here, all Class members share common questions, including  
22 whether NJOY's Safety Message was deceptive, whether NJOY's packaging  
23 contained misleading partial disclosures about the health risks of the product, and  
24 whether NJOY's misrepresentations and omissions were material. All of these  
25 questions can be answered with a yes or no, and are common to the claims of all  
26 Class members.

27 Plaintiffs' claims are also typical of those of the Class. Rule 23(a)(3) is  
28 satisfied where a plaintiff's claims are "'reasonably co-extensive' with absent class

1 members' claims. They need not be 'substantially identical.'" *ConAgra*, 2015 U.S.  
2 Dist. LEXIS 24921, at \*\*100-01. Typicality is established where the class was  
3 injured through an alleged common practice. *Id.* That a plaintiff may have relied on  
4 different statements than some class members does not make that plaintiff's claim  
5 atypical. *Cabral v. Supple, LLC*, 2013 U.S. Dist. LEXIS 184170, \*11 (C.D. Cal.  
6 Feb. 14, 2013). Here, the claims of the proposed Class representatives are typical  
7 because they are based on the same deceptive conduct by NJOY that harmed Class  
8 members in the same way. All Class members were exposed to the package and/or  
9 NJOY's media advertising that conveyed the same Safety Message. For example,  
10 the tag lines that smokers finally have a "real alternative" and "cigarettes, you've  
11 met your match" were on virtually every piece of advertising. Plaintiffs' claims are  
12 "reasonably co-extensive" with Class members' claims and typicality is met.

13 Finally, Plaintiffs satisfy Rule 23(a)(4)'s adequacy requirement. This is  
14 determined by whether "the named plaintiffs and their counsel have any conflicts of  
15 interest with other class members," and whether "the named plaintiffs and their  
16 counsel will prosecute the action vigorously on behalf of the class." *Keegan v. Am.*  
17 *Honda Motor Co.*, , 284 F.R.D. 504, 525 (quoting *Hanlon v. Chrysler Corp.*, 150  
18 F.3d, 1011, 1020 (9th Cir. 1998)). Here, the interests of Plaintiffs and the Class are  
19 fully aligned in determining whether NJOY deceptively or falsely marketed NJOYs.  
20 Plaintiffs have been active in this case at all relevant times, and will continue to  
21 actively participate, including by sitting for depositions. *See* Pollack Dec. ¶¶2-3. In  
22 addition, Plaintiffs have retained the law firms of Wolf Haldenstein Adler Freeman  
23 & Herz LLP, Levi & Korsinsky LLP, and The Westerman Law Corporation, which  
24 have been appointed as interim lead counsel. All of these firms have significant  
25 experience in prosecuting large consumer fraud class actions and are well-qualified  
26 to represent the Class. (*See* Dkt. 36-1 - 36-7, Declaration of Janine L. Pollack in  
27 Support of Appointment of Interim Class Counsel, with exhibits.)

1           **C.     The Proposed Class Is Ascertainable**

2           A class is ascertainable if “it can be identified through reference to objective  
3 criteria and subjective standards such as a class member's state of mind should not  
4 be used when defining the class.” *Guido v. L’Oreal, USA, Inc.*, 2014 U.S. Dist.  
5 LEXIS 165777, at \*\*51-52 (C.D. Cal. July 24, 2014). The class need only be  
6 “administratively feasible for the court to determine whether a particular individual  
7 is a member.” *ConAgra*, 2015 U.S. Dist. LEXIS 24971, at \*90; *In re Nucoa Real*  
8 *Margarine Litig.*, 2012 U.S. Dist. LEXIS 189901, at \*\*17-18 (C.D. Cal. June 12,  
9 2012) (Morrow, J.). “[I]n this Circuit, it is enough that the class definition describes  
10 ‘a set of common characteristics sufficient to allow’ a prospective plaintiff to  
11 identify himself or herself as having a right to recover based on the description.”  
12 *McCrory v. Elations Co., LLC*, 2014 U.S. Dist. LEXIS 8443, at \*24 (C.D. Cal. Jan.  
13 13, 2014) (internal citation omitted).

14           In *ConAgra*, this Court held that classes are ascertainable even if there may be  
15 no way to determine the identity of purchasers, finding that to hold otherwise  
16 “would effectively prohibit class actions involving low priced consumer goods -- the  
17 very type of claims that would not be filed individually -- thereby upending ‘[t]he  
18 policy at the very core of the class action mechanism.’” *ConAgra*, 2015 U.S. Dist.  
19 LEXIS 24971, at \*93.<sup>7</sup> Thus, “[c]ourts routinely certify class actions involving  
20 inexpensive products where there are unlikely to be records of who purchased the  
21 product.” *L’Oreal*, 2014 U.S. Dist. LEXIS 165777, at \*42.

22           Here, one factor determines whether or not a person is a Class member:

23           

---

<sup>7</sup> While the Third Circuit in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013),  
24 decertified a class because class members likely lacked records of their purchases,  
25 and the manufacturer did not keep records of sales, this Court has noted that  
26 “*Carrera* is not currently the law in the Ninth Circuit.” *ConAgra*, , 2015 U.S. Dist.  
27 LEXIS 24971 at \*93. *Carrera* should not be followed as it “eviscerates low  
28 purchase price consumer class actions.” *McCrory*, 2014 U.S. Dist. LEXIS 8443, at  
\* 24.

1 whether he or she purchased NJOYs in California or Florida during the applicable  
2 Class Period. Thus, it will be “administratively feasible for the court to determine  
3 whether a particular individual is a member” using objective criteria. Also, many  
4 Class members can be identified through records [REDACTED] retail outlets.  
5 Defendant sold more than [REDACTED]  
6 (D-0726427), [REDACTED] NJOY also  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED] *See, e.g.,* E-58438, F-632647. Moreover, NJOY [REDACTED]  
10 [REDACTED] (*e.g.,* G-544585, H-529017-18;  
11 Pollack Dec. Ex. I, Uncertified Transcript of Deposition of Roy Anise held May 11,  
12 2015 (“Anise Tr.”) at 97, final to be provided to the Court upon receipt) [REDACTED]  
13 [REDACTED] Finally, mass club retailers, such as Walgreen’s,  
14 Sam’s Club, and Costco, which use membership cards, retain purchase information  
15 for members. *See* Pollack Dec., Ex. J (declaration of Costco employee showing  
16 notice was sent to class members in a consumer protection action). The Class is  
17 sufficiently ascertainable.

18 **D. The Class Can Be Maintained Under Rule 23(b)(3)**

19 **1. Plaintiffs Satisfy Predominance Under Rule 23(b)(3)(i)**

20 “If common questions ‘present a significant aspect of the case and they can be  
21 resolved for all members of the class in a single adjudication,’ then ‘there is clear  
22 justification for handling the dispute on a representative ... basis,’ and the  
23 predominance test is satisfied.” *Conagra*, 2015 U.S. Dist. LEXIS 24971, at \*122,  
24 citing *Hanlon*, 150 F.3d at 1022. “Predominance is a test readily met in certain  
25 cases alleging consumer or securities fraud.” *Amchem*, 521 U.S. at 625. Here,  
26 common questions will govern the determination of the action.



1 a) **Common Questions of Fact Predominate**

2 A common nucleus of facts underlies each claim. The same evidence will  
3 prove all Class members' claims.

4 **(1) Defendant Disseminated the Same False and**  
5 **Deceptive Safety Message Across Various Media**

6 The Safety Message pervaded Defendants' marketing. It was uniform in  
7 substance, regardless of the exact words used or the form that the marketing took.  
8 "[A] false or misleading advertising campaign need not 'consist of a specifically-  
9 worded false statement repeated to each and every [member] of the plaintiff class.'" *Cabral*, 2013 U.S. Dist. LEXIS 184170, at \*13 (quoting *In re First Alliance*  
10 *Mortgage Co.*, 471 F.3d 977, 992 (9th Cir. 2006)). Thus, that some Class members  
11 may have been exposed to different iterations of NJOY's Safety Message than others  
12 does not weigh against certification. "The class action mechanism would be  
13 impotent if a defendant could escape much of his potential liability for fraud by  
14 simply altering the wording or format of his misrepresentations across the class of  
15 victims." *Id.* (certifying class despite differences in iterations of advertising).  
16 *Johnson v. General Mills, Inc.*, 275 F.R.D. 282, 288-89 (C.D. Cal. 2011) (individual  
17 issues did not predominate even though purchasers were exposed to different mixes  
18 of packages and advertisements); *see also Makaeff v. Trump Univ., LLC*, 2014 U.S.  
19 Dist. LEXIS 22392, at \*28 (S.D. Cal. Feb. 21, 2014) ("fact that each Plaintiff may  
20 have seen a different advertisement, or no advertisement at all, does not defeat  
21 typicality."). Under FDUTPA, as under the CLRA and UCL, that each class member  
22 was likely exposed to a unique array of advertising statements, and would therefore  
23 be required to rely on a slightly divergent pool of evidence, is no bar to class  
24 certification. *Nelson v. Mead Johnson Nutrition Co.*, 270 F.R.D. 689, 696 (S.D. Fla.  
25 2010) ("Defendant's argument that other members of the class viewed different  
26 representations than Plaintiff does not render Plaintiff's claim atypical").  
27

28 Here, Plaintiffs and the Class were exposed to advertising with a common



1 implicit Safety Message, subject to nonsubstantive variations. From the outset of its  
2 business in 2007, NJOY made extensive use of the slogan “All the Pleasures of  
3 Smoking Without All the Problems.” ¶¶50-59. However, in the 2010 Consent  
4 Judgment with the California AG, NJOY was prohibited from making claims about  
5 its e-cigarettes “being safer than cigarettes without competent, reliable scientific  
6 evidence to support the claims.” *People of the State of CA v. Sottera, Inc., DBA*  
7 *NJOY*, Case No. RG10528622, Consent Judgment at 9(c). Apparently lacking such  
8 “reliable, scientific evidence,” [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED] (K-553148). [REDACTED], the slogan,  
12 “everything you like about smoking without the things you don’t” (and variations  
13 thereof), which is nearly indistinguishable from the “all the pleasures of smoking  
14 without all the problems” line, appeared in several NJOY Kings ads and on NJOY’s  
15 website at least as late as 2014. ¶¶67-72, 83, 87. As described above, virtually all  
16 of the advertising statements NJOY used during the Class Period contained the  
17 taglines that smokers finally have a “real alternative” and “cigarettes you’ve met  
18 your match.” See, e.g., Pollack Dec. Ex. L, Uncertified Transcript of Deposition of  
19 Francesca Vaccari held May 13, 2015 (“Vaccari Tr.”)(final to be provided to the  
20 Court upon receipt), NJOY’s marketing manager, formerly of Sony Arcade  
21 (“Arcade”), NJOY’s advertising agency, at 33-36. Both of these taglines convey the  
22 overarching theme that NJOYs were known to be safe or safer than cigarettes.<sup>8</sup>

23 While NJOY did not include advertising statements on its packages, the  
24 packages nonetheless promoted NJOY’s core marketing Safety Message. Each

25 <sup>8</sup> For example, Vaccari called the [REDACTED]  
26 [REDACTED] which she explained at her deposition [REDACTED]  
27 [REDACTED]  
28 [REDACTED] Vaccari Tr. at 75-78 [REDACTED]

1 package discussed only one ingredient -- nicotine -- warning for example that  
2 nicotine should not be used by people with certain medical conditions. ¶61.  
3 However, the packages failed to list other ingredients, including propylene glycol  
4 and glycerin, or disclose NJOYs other health risks. ¶64-65.

5 NJOY knew of these dangers. For example, a 2009 report by the FDA found  
6 that “certain tobacco-specific nitrosamines which are human carcinogens” and  
7 “tobacco specific impurities suspected of being harmful to humans” were detected  
8 in NJOY samples. ¶34. Another study that tested NJOYs and other e-cigarettes  
9 found that they “required a stronger vacuum [inhalation strength] to smoke than  
10 conventional [tobacco] brands” and that “the effects of this on human health could  
11 be adverse.” ¶37. Other studies have shown that e-cigarettes have immediate  
12 adverse physiologic effects similar to those seen with tobacco smoking (¶¶44), and  
13 concluded that “E-cigarettes cannot be rated as safe at the present time.” ¶42; *see*  
14 Vaccari Tr. at 49-50 [REDACTED]

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED] *E.g.*, M-36609, N-36413, O-35275, P-33545. [REDACTED]

19 [REDACTED] (Q-553392), [REDACTED]

20 [REDACTED] (R-87665-66), [REDACTED]  
21 [REDACTED]

22 (*see, e.g.*, S-560362-414, at 560392; Anise Tr. at 56), [REDACTED]  
23 [REDACTED]

24 *See, e.g.*, T-552987. [REDACTED]

25 [REDACTED] *See, e.g.*, U-528664. Yet NJOY nowhere disclosed these risks, including  
26 on its packages when it was disclosing risks about nicotine.

27 In order to ensure a uniform marketing message, NJOY intentionally  
28 maintained brand consistency. [REDACTED]

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[REDACTED]

[REDACTED] V-1284. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] W-52011. [REDACTED]

[REDACTED]

[REDACTED] X-65430.

[REDACTED]

[REDACTED] *See, e.g.,* Y-8509 [REDACTED] NJOY widely  
disseminated the advertising containing the false and deceptive Safety Message  
(including many of the slogans at issue in this case – *e.g.*, “Friends Don’t Let  
Friends Smoke,” “Cigarettes You’ve Met Your Match”; and “Finally, Smokers  
Have a Real Alternative”) across the country, including in California and Florida.<sup>9</sup>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] AA-18989. [REDACTED]

[REDACTED]

[REDACTED] AB-18108-18109. [REDACTED]

[REDACTED]

[REDACTED] (AC-540647); [REDACTED]

[REDACTED]

[REDACTED] AC-540653). [REDACTED]

[REDACTED] AD-  
2624.

[REDACTED]

<sup>9</sup> [REDACTED] Y-  
8573. [REDACTED] Z-3727.

Defendants' marketing was designed to and did impart a common Safety Message such that it can and should be addressed on a classwide basis.

**(2) Reasonable Consumers Would Understand NJOY's Marketing as Conveying a Safety Message**

"Plaintiffs need not prove at this stage that every ... customer would find the ... [advertising claim] material" or interpret it as Plaintiffs allege but rather "need only demonstrate that a reasonable consumer would understand it in that way and find it material." *Conagra*, 2015 U.S. Dist. LEXIS 24971, at \*219. Here, Plaintiffs conducted a survey that shows that a reasonable consumer would understand the Safety Message from NJOY's marketing.

Dr. Thomas J. Maronick, Plaintiffs' marketing expert who was formerly at the Federal Trade Commission and is currently a marketing professor at Towson University, conducted an empirical analysis of consumer perceptions of NJOYs marketing. Declaration of Dr. Thomas Maronick in Support of Class Certification ("Maronick Dec."), ¶¶19-20. Dr. Maronick designed a survey in which respondents who had tried NJOYs were divided into groups. One group was shown the "Friends Don't Let Friends Smoke" television commercial, the second group was shown the "Resolution Solution" print ad, and a third group was shown the "Try Something New in Bed" print ad.

Of those who viewed the "Friends Don't Let Friends Smoke" commercial, when asked to pick all descriptors that reflected the message of the ad, 73% believed the ad said or suggested NJOYs are safer for your health than traditional cigarettes, and 38% believed it said or suggested they were safe. *Id.*, ¶39. When presented with a similar choice, 43% of those who saw the "Resolution Solution" and "Try Something New in Bed" print ads took the message that NJOYs are safer for health than traditional cigarettes, and 33% and 24% respectively believed that the ad meant they were safe. *Id.*, ¶32.

When asked open-ended questions about their perception of ads, a significant

percentage of respondents wrote in the overt, rather than the implied, message of the ads. For example, 30.7% of respondents who were shown the “Resolution Solution” ad, and 18.7% who saw the “Try Something New in Bed” ad, said the ad said or suggested that NJOYs provided the “look,” “feel,” taste” or “experience” of a real cigarette, where the ads contained the copy “the first electronic cigarette with the look and feel of the real thing, and authentic flavor developed in the USA by our Master Flavorist.”<sup>10</sup> *Id.*, ¶30. This is consistent with NJOY’s plan to seem to be advertising NJOYs with overt non-health messages, with the intent that the implied Safety Message would be “picked up” by consumers – something confirmed by Dr. Maronick’s survey results which showed that a material percentage of consumers, when asked a closed-end question, consistently chose “safe” and “safety” as the message of the ads.<sup>11</sup> However, in some of NJOY’s ads, the health message was so obvious that even open-ended questions drew safety-related messages. For example, when asked an open-ended question about the TV commercial, 40.7% wrote in responses reflecting their view that friends don’t let friends smoke because it is bad for their health, and 17.6% wrote in that NJOY’s were safe, better for them, or risk free. *Id.* That consumers perceived multiple messages does not defeat class certification as long as Plaintiffs can demonstrate that a “reasonable consumer”

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<sup>10</sup> Similarly, 33.7% and 47.6% of respondents who were shown the “resolution” and “try something new” ads, respectively, took away the message that NJOYs were an alternative to or better than tobacco cigarettes, where each ad also included the smokers have a “real alternative” language. *Id.*, Table 6. Open-ended questions concerning the “cigarettes you’ve met your match” and the smokers have a “real alternative” statements, which appeared in both of the ads, drew similar responses. *Id.*, ¶34.

<sup>11</sup> Other choices on the closed-end questions were smoking indoors, smoking NJOYs is cool, NJOYs can be smoked in a social setting, NJOYs look and feel like traditional cigarettes, NJOYs have no smoke, and they cost less than traditional cigarettes. *Id.*, ¶32.

1 would understand the message at issue in the way Plaintiffs have alleged. *Conagra*,  
2 2015 U.S. Dist. LEXIS 24971, at \*219. Dr. Maronick’s survey demonstrates that  
3 while NJOY was successful in conveying that benefits of its products included that  
4 they had the look and feel of cigarettes but had no smoke or ash, a reasonable  
5 consumer would still take away the Safety Message. The survey shows that these  
6 consumer perceptions are measurable on a classwide basis.

7 **(3) Common Evidence Will Show Defendant Intended**  
8 **to Imply the Safety Message**

9 The common evidence of NJOY’s intent to imply a health message to  
10 capitalize on consumers’ desires for a healthier way to smoke is overwhelming. [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED] AE-559401, 559405 [REDACTED]  
15 [REDACTED]

16 [REDACTED] A creative brief between NJOY and its advertising agency in  
17 [REDACTED] described NJOY’s brand positioning as combining “what smokers have  
18 loved for so long (real tobacco pleasure) with the innovations that eliminate  
19 everything they are looking to avoid—odor, smoke, *and safer than cigarettes*  
20 *(although not communicated)* ....” (AF-43000) (emphasis added); ¶105. On July  
21 21, 2012, NJOY’s EVP Roy Anise stated that [REDACTED]  
22 [REDACTED] its strategy to “Obsolete Cigarettes” “will get across the ‘safer’  
23 message in the pick up” [REDACTED] AG-  
24 51682-83.

25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED] AH-540206 [REDACTED]  
28 [REDACTED]

1 [REDACTED] AI-NJOY00540486 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED] AH-540206-07.

6 Mindful that NJOY could not be perceived as directly making health claims  
7 but determined to imply them, [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED] B-43152 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]

15 [REDACTED] AJ-543946. Nonetheless, NJOY utilized this very slogan anyway in its  
16 advertising. ¶83. [REDACTED]  
17 [REDACTED]  
18 [REDACTED] AK-544096-97.

19 NJOY's desire to convey an implied Safety Message is also evidenced by its  
20 hiring of Dr. Richard Carmona, a former U.S. Surgeon General, who was highly  
21 critical of tobacco cigarettes, to join its Board of Directors and head its Scientific  
22 Advisory Board. [REDACTED] (*see, e.g.*, Y-  
23 8562), and NJOY issued a press release concerning his joining NJOY, quoting him  
24 as stating, for example, that NJOYs have tremendous "harm reduction potential."  
25 AL-78996.

26 Accordingly, common evidence will determine – indeed, has already shown –  
27 that NJOY intended its marketing to imply the Safety Message.  
28



(4) Common Evidence Can Be Used to Establish  
Materiality

A misrepresentation or omission is material if a reasonable person “would attach importance to its existence or nonexistence in determining his choice of action.” *ConAgra*, 2015 U.S. Dist. LEXIS 24971, at \*229. “Because materiality is judged according to an objective standard, the materiality of alleged misrepresentations and omissions is a question common to all members of the class.” *Amgen, Inc.*, 133 S. Ct. at 1191. As set forth above, “Plaintiffs need not prove at this stage that every ... customer would find the ... [advertising claim] material” or interpret it as Plaintiffs allege. *ConAgra*, 2015 U.S. Dist. LEXIS 24971, at \*219. “[T]hey need only demonstrate that a reasonable consumer would understand it in that way and find it material.” *Id.* Moreover, “materiality is generally a question of fact for the jury.” *Johnson*, 275 F.R.D. at 287.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] AM-  
345764, 345770, 345799. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See also AN-45160-65 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED] AP-49596. [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED] (AQ-6581, 6585), [REDACTED]  
5 [REDACTED]  
6 [REDACTED] AR-4782. [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED] See *ConAgra*, 2015 U.S. Dist.  
12 LEXIS 24971, at \*220 (citing *Oshana v. Coca-Cola Co.*, 2005 U.S. Dist. LEXIS  
13 14184 (N.D. Ill. July 13, 2005) as holding a study showing 24% of consumers  
14 would behave differently was sufficient to establish materiality).<sup>12</sup>

15 Dr. Maronick’s survey confirms NJOY’s own market research demonstrating  
16 the materiality of its Safety Message. Maronick Dec., ¶¶5, 44. The survey shows  
17 that, of respondents who said the NJOY ads they saw said or suggested NJOYs were  
18 “safe for your health” or “safer for your health than traditional tobacco cigarettes,”  
19 between 95% and 99% of respondents seeing either of the two NJOY print ads and  
20 over 90% of respondents who saw the “Friends” TV ad, said “safety” was either  
21 “important” or “very important” in a person’s decision to smoke NJOYs. *Id.*, ¶¶33,  
22 40. In addition, 91% indicated that “[i]f there were health risks associated with the  
23

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24 <sup>12</sup> [REDACTED]  
25 [REDACTED] (E-5843);  
26 [REDACTED] (e.g., NJOY00058438); [REDACTED]  
27 [REDACTED]  
28 [REDACTED] (F -632117.)

1 ingredients in NJOYs, other than those listed on the NJOY E-Cigarette package,” it  
2 would be either “very important” or “important” that other ingredients associated  
3 with health risks be listed on the NJOY package. *Id.*, ¶43.

4 **(5) Common Evidence Can Be Used to Establish**  
5 **Whether NJOYs Are Safe or Safer than Cigarettes**

6 All NJOYs sold during the Class Period operated by heating substantially the  
7 same ingredients to a vapor that consumers drew into their lungs. Plaintiffs will  
8 submit scientific evidence demonstrating the risks and harms associated with the  
9 inhalation of the ingredients in NJOYs, which will apply classwide.

10 **b) Common Questions of Law Predominate**

11 **(1) The California Consumer Protection Claims**

12 For purposes of class certification, the UCL and the CLRA are materially  
13 indistinguishable. *Forcellati v Hyland’s, Inc.*, 2014 U.S. Dist. LEXIS 50600, at \*28-  
14 29 (C.D. Cal. Apr. 9, 2014). A plaintiff need not prove that every class member  
15 “‘was actually deceived, relied upon the fraudulent practice, or sustained any  
16 damage.’” *Heighley v. J.C. Penney Life Ins. Co.*, 257 F. Supp. 2d 1241, 1259 (C.D.  
17 Cal. 2003). Individual reliance is not required, nor must the message at issue  
18 provide the only reason to purchase (*Kwikset Corp. v. Sup. Court*, 51 Cal. 4th 310,  
19 326-27 (2011)), and the question is whether the product would have been deceptive  
20 to a reasonable consumer. *ConAgra*, 2015 U.S. Dist. LEXIS 24971, at \*219.  
21 Where misrepresentations and omissions are material, reliance is presumed.  
22 *Id.* at 231; *also Keegan*, 284 F.R.D. at 533-534. Thus, if the California Plaintiff  
23 succeeds in proving that NJOY’s misrepresentations are material he is entitled to a  
24 presumption of reliance. *See* Section II.D.1.(a)(4), *supra*.

25 **(2) Florida Consumer Protection Claims**

26 “[T]he Eleventh Circuit has said that the FDUTPA does not require a  
27 plaintiff to prove the misrepresentation caused them to do anything; rather, the  
28 causation requirement is resolved based on how an objective reasonable person

1 would behave under the circumstances.” *Fitzpatrick v. General Mills, Inc.*, 263  
2 F.R.D. 687, 694-95 (S.D. Fla. 2010) (*vacated on other grounds*, 635 F.3d 1279  
3 (11th Cir. 2011). That “[c]laims under the FDUTPA are governed by a ‘reasonable  
4 consumer’ standard ... obviat[es] the need for proof of individual reliance by  
5 putative class members.” *ConAgra*, 2015 U.S. Dist. LEXIS 24971, at \*151. The  
6 determinations key to the Florida Plaintiff’s claims thus center on Defendant’s  
7 words and actions toward the Class as a whole. Accordingly, common question of  
8 law predominate for the California and Florida claims.

9 **c) Plaintiffs’ Damages Are Tied To their Theory of**  
10 **Liability and Calculable Classwide**

11 In *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Supreme Court  
12 held that plaintiffs’ method of proving damages must be tied to their theory of  
13 liability where plaintiffs alleged four different theories of liability each of which  
14 resulted in a different kind of harm. *Id.* at 1433.<sup>13</sup> Here, Plaintiffs allege one harm  
15 resulting from NJOY’s Safety Message – consumers paid a premium for its products  
16 – and thus a single damages model is sufficient. *Vaccarino v. Midland Nat’l Life*  
17 *Ins. Co.*, 2014 U.S. Dist. LEXIS 18601, at \*21 (C.D. Cal. Feb. 3, 2014).

18 Plaintiffs, through their economics expert, Dr. Jeffrey Harris,<sup>14</sup> offer two

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19 <sup>13</sup> The Second Circuit recently clarified, in *Roach v. T.L. Cannon Corp.*, 778 F.3d  
20 401, 402-03 (2d Cir. 2015), that “*Comcast [Corp. v. Behrend, 133 S. Ct. 1426*  
21 *(2013)* from which many damages pleading rulings derive], does not mandate that  
22 certification pursuant to Rule 23(b)(3) requires a finding that damages are capable of  
measurement on a classwide basis.”

23 <sup>14</sup> Dr. Harris is a tenured economics professor at MIT. He has provided deposition  
24 and trial testimony (and expert reports) concerning damages in numerous “light”  
25 cigarettes cases, at least four which employed one or both of the conjoint or direct  
26 methods he proposes to use here to determine the value consumers attach to the  
27 alleged safety claims made by manufacturers of “light” cigarettes. Declaration of  
28 Dr. Jeffrey Harris in Support of Motion for Class Certification (“Harris Dec.”), ¶¶1-  
6.

1 methods of calculating damages that are tied to their liability theory – conjoint  
2 analysis and the direct method – that can be used to determine the value consumers  
3 place solely on the Safety Message, calculate the price premium attributable to that  
4 value, and calculate damages by applying the premium to NJOY’s historical sales  
5 data. Based on his review of professional economic studies, NJOY’s market  
6 research and marketing documents, and his own expertise as an economist with  
7 experience in creating damages models, Dr. Harris concludes that: (a) a reasonable  
8 consumer would be willing to pay a price premium for the perceived value of  
9 NJOY’s Safety Message; (b) there are scientifically reliable methods to measure the  
10 price premium that Class members paid for the perceived value of the Safety  
11 Message during the Class Period; and (c) using historical data of NJOY’s sales to  
12 Class members (from Nielsen data and NJOY’s records of its internet sales) during  
13 the Class Period, estimates of the price premiums paid for NJOY’s Safety Message  
14 can be used to calculate classwide damages during the Class Period. Harris Dec.,  
15 ¶¶17-19.

16 As Dr. Harris notes, conjoint analysis is a survey technique that is widely  
17 used to assess the value consumers place on specific attributes of products. *Id.*, ¶43.  
18 “Conjoint analysis is regularly used in litigation to translate the ‘relative  
19 importance’ of a product feature into a price premium paid by consumers.”  
20 *ConAgra*, 2015 U.S. Dist. LEXIS 24971, at \*245. *See, also, e.g., Apple Inc. v.*  
21 *Samsung Elecs. Co.*, 735F.3d 1352, 1368 (Fed. Cir. 2013) (district court abused  
22 discretion in failing to consider plaintiff’s expert’s conjoint analysis); *L’Oreal*, 2014  
23 U.S. Dist. LEXIS 165777, \*18 (“Conjoint analysis ha[s] been the subject of  
24 extensive literature published in peer-reviewed journals”); *TV Interactive Data*  
25 *Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006, 1020-27 (N.D. Cal. 2013) (conjoint  
26 analysis admitted where used to identify a “value” for specific product attributes).

27 Dr. Harris describes how he will perform conjoint analysis to calculate  
28 damages that are ascribable only to the value, if any, that consumers place on the

1 Safety Message – *i.e.*, that NJOYs are known to be safe or safer than traditional  
2 cigarettes, which Plaintiffs allege NJOY misleadingly portrayed them to be – as  
3 opposed to the value consumers place on other attributes of NJOYs. Harris Dec.,  
4 ¶¶43-53. Survey participants will be asked to make a series of choices between  
5 various combinations of product attributes. *Id.*, ¶45. An analyst will then combine  
6 all of the attributes in all of the choice sets to isolate the value (partworth) of each  
7 attribute. *Id.*, ¶46. Two of the attributes in the NJOY survey will be price and  
8 safety.<sup>15</sup> *Id.*, ¶48. Dr. Harris has identified additional attributes based on NJOY’s  
9 internal documents, which indicate that consumers may place value on battery life,  
10 rechargeable vs. disposable, flavor, size, packaging, resemblance to a traditional  
11 cigarette, and ability to smoke in more places. *Id.* The safety attribute will be  
12 included in the study at two levels, one that corresponds to the product with the  
13 Safety Message, and the other that corresponds to the product without it. *Id.*, ¶¶49-  
14 51. The price levels can be expressed in dollar units or in percentages. Thus, a  
15 respondent might be asked to indicate whether he would pay 20% more, the same  
16 as, or 20% less than he usually pays for an NJOY, if that NJOY had a particular  
17 combination of features. *Id.*<sup>16</sup> The price premium linked to the Safety Message can  
18 then be calculated as a percentage of the purchase price. *Id.*, at ¶52.

19 With the direct method, survey respondents will be asked to indicate the price  
20 they would pay for an NJOY e-cigarette with the Safety Message relative to the  
21 price they would pay for the product without it, using percentage point increments.  
22

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23 <sup>15</sup> When one of the attributes in a conjoint survey refers to price, the conjoint  
24 analysis can be used to attribute the price premium that consumers are willing to pay  
25 for each of the other attributes. *Id.*, ¶46.

26 <sup>16</sup> It is not necessary that these studies be carried out prior to class certification.  
27 They must “merely provide a method for calculating that premium on a classwide  
28 basis.” *L’Oreal*, 2014 U.S. Dist. LEXIS 165777, at \*21; *ConAgra*, 2015 U.S. Dist.  
LEXIS 24971, at \*247.



1 The price premium attributable to NJOY's Safety Message would then be computed  
2 as the average discount that respondents would pay for the "unsafe" e-cigarette. This  
3 method closely [REDACTED]

4 [REDACTED] See, e.g., AS-1467, at  
5 1489. It is a variation of contingent valuation, an approach that has long been widely  
6 used by economists, and which has been accepted in this district. *In re Toyota*  
7 *Motor Corp. Hybrid Brake Mktg.*, 2012 U.S. Dist. LEXIS 151559, \*18 (C.D. Cal.  
8 Sept. 20, 2012) ("contingent valuation, and discrete choice, are generally accepted,  
9 have been tested, and are part of peer-reviewed studies.").

10 Dr. Harris will select a reputable survey search firm and the survey will be  
11 designed, pretested, administered, and the data analyzed under his direction. Harris  
12 Dec., ¶¶62-66. Further, because both surveys will include Class members from  
13 California and Florida, it will be possible to compute the price premium attributable  
14 to the Safety Message separately for each state. *Id.*, ¶¶53, 61.

15 The direct and conjoint methodologies meet the requirements of *Comcast*  
16 because they measure the damages classwide stemming from the alleged misconduct  
17 in a manner consistent with Plaintiffs' theory of the case. See *Vaccarino*, 2014 U.S.  
18 Dist. LEXIS 18601, at \*\*36-38; *In Re High-Tech Employee Antitrust Litigation*,  
19 289.F.R.D. 555, 582 (N.D. Cal. 2013).

20 **E. A Class Action is a Superior Means of Resolving these Claims**

21 Finally, Plaintiffs satisfy Rule 23(b)(3)'s requirement that "a class action is  
22 superior to other available methods for fairly and efficiently adjudicating the  
23 controversy." *ConAgra*, 2015 U.S. Dist. LEXIS 24971, at 122. The factors for  
24 consideration with respect to superiority are: (A) the class members' interests in  
25 individually controlling the prosecution or defense of separate actions; (B) the  
26 extent and nature of any litigation concerning the controversy already begun by or  
27 against class members; (C) the desirability or undesirability of concentrating the  
28 litigation of the claims in the particular forum; and (D) the likely difficulties in



1 managing a class action. Fed. R. Civ. P. 23(b)(3).

2 “Where damages suffered by each putative class member are not large, th[e]  
3 first] factor weighs in favor of certifying a class action.” *ConAgra*, 2015 U.S. Dist.  
4 LEXIS 24971, at \* 261. Here, the purchase price of each e-cigarette was relatively  
5 low, so the first factor weighs in favor of certifying a class. The second factor also  
6 favors certification – this action is the only one pending on its bases against  
7 Defendant. With respect to the third factor, here, as in *ConAgra*, “[g]iven the small  
8 recovery that any individual plaintiff can expect, moreover, concentrating the  
9 litigation in a single forum is appropriate.” *Id.*, at \*262. Finally, this action will be  
10 manageable. It concerns only two classes and three claims, far fewer than that  
11 found to be manageable in *ConAgra*.

12 As to class notice, first, [REDACTED]

13 [REDACTED] In addition, Plaintiffs’ counsel will work with a nationally  
14 recognized notice expert to develop a plan focused primarily on publicizing notice  
15 to the Class in targeted periodicals and across numerous internet sites and through  
16 mobile banner ads. Similar notice plans have been accepted in consumer class  
17 actions. *See, e.g., Arnold v. FitFlop USA, LLC*, 2014 U.S. Dist. LEXIS 58800 (S.D.  
18 Cal. Apr. 28, 2014); *Bezdek v. Vibram USA Inc.*, 2015 U.S. Dist. LEXIS 5508 (D.  
19 Mass. Jan. 16, 2015).

### 20 **III. CONCLUSION**

21 For all of the foregoing reasons, Plaintiffs respectfully submit that the  
22 California Class should be certified, with the California Plaintiff as its Class  
23 Representative, and the Florida Class should be certified, with the Florida Plaintiff  
24 as its Class Representative, and Plaintiffs’ Interim Lead Counsel should be  
25 appointed as Class Counsel.

26 Dated: May 21, 2015

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27  
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